

**Matter of 200-230 W. 99 Realty, L.L.C. v New York
State Div. of Hous. & Community Renewal**

2007 NY Slip Op 32444(U)

July 27, 2007

Supreme Court, New York County

Docket Number: 0118662/2006

Judge: Lewis Bart Stone

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. LEWIS BART STONE

PART 505

Index Number : 118662/2006

200-230 W. 99 REALTY

vs

HOUSING & COMMUNITY RENEWAL

Sequence Number : 001

ARTICLE 78

INDEX NO. 118662/06

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the annexed Recession and Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
AUG 08 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 27 July 07

Lewis Bart Stone

HON. LEWIS BART STONE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

-----X
 In the Matter of the Application of :
 200-230 W. 99 Realty, L.L.C., :
 :
 Petitioner, : DECISION AND
 : ORDER
 For a Judgment Pursuant to Article 78 :
 of the Civil Practice Law and Rules : INDEX NUMBER
 : 118662/06
 -against- :
 NEW YORK STATE DIVISION OF HOUSING :
 AND COMMUNITY RENEWAL. :
 :
 Respondent. :
 -----X

DECISION AND
ORDER
INDEX NUMBER
118662/06

FILED
AUG 08 2007
NEW YORK
COUNTY CLERKS OFFICE

Hon. Lewis Bart Stone, J

This proceeding was commenced pursuant to Civil Practice Law and Rules (“CPLR”), Article 78 by Petitioner, 200-230 W. 99 Realty, L.L.C. (“Realty”) by Notice of Petition, dated December 14, 2006, against Respondent, New York State Division of Housing and Community Renewal (“DHCR”) to review a decision of DHCR, issued on October 16, 2006 (the “Decision”) which denied Realty all rental increases arising out of expenditures made by Realty for certain improvements at the building at 212-216 West 96th Street, New York, N.Y. (the “Building”) owned by Realty. The building is subject to the Rent Stabilization Law (“RSL”) and the Rent Stabilization Code (the “Code”).

DHCR

BACKGROUND

Under the RSL, building owners are entitled to certain rent increases in accordance with a statutory formula for certain building wide improvements. This provision of the RSL was designed to induce owners to continue to invest and maintain RSL regulated buildings by creating incentive for capital re-investments within the regulatory system. Ansonia Residents Assoc. v. DHCR, 75 NY2d 206 (1986). These increases are referred to as Major Capital Improvement ("MCI") increases. Under RSL, DHCR reviews owners' applications for MCI increases to assure compliance with law following the time the improvements have been made.

This dispute involves an attempt by the Owner to secure an MCI increase for a building wide repiping of plumbing and gas lines, and installation of new toilets at the Building made in 1999. After the work was allegedly completed on August 21, 2001, the Owner filed an application with DHCR for the MCI, certifying that the improvements had been made. On September 26, 2001, DHCR gave notice of this application to the tenants of the Building in order to give them an opportunity to comment on or oppose the Owner's application. On March 28, 2002, the DHCR Rent Administrator, after reviewing the Owner's application, the opposition submitted by certain tenants and the responses of Owner, granted the MCI, noting that unsatisfied tenants could "file for rent reductions based on decreased services if services are not

being maintained.”¹

Several tenants filed timely petitions for Administrative Review of this grant, which were sent to the Owner on June 14, 2002 to give the Owner an opportunity to respond. On October 22, 2002, DHCR issued a decision (the “2002 Decision”) which granted the PAR in part, by disallowing \$25,000 for toilets and reducing the allowance for piping from \$66,350 to \$63,850.

On December 20, 2002, a tenant of the Building commenced a proceeding in Supreme Court under CPLR Article 78 to challenge the 2002 Decision. No court ruled on such petition but on January 27, 2003, the Owner and DHCR entered into a stipulation to remand the proceeding “for further processing, including submission of evidence and inspection of premises and issuance of a new order.”

The re-opened proceeding eventually resulted in a grant of the PAR revoking the MCI in its entirety. During such re-opened proceeding, DHCR failed, however, to disclose to the Owner certain tenant submissions which had been the basis of the revocation so as to and accord Owner an opportunity to counter them. The Owner then filed an Article 78 proceeding, and the Owner and DHCR stipulated to again remand the proceeding to DHCR to allow the Owner to respond to the tenants’

¹ This statement merely tracks existing law and procedures which are always available to rent regulated tenants.

complaints. DHCR gave notice to all parties as to such re-opened hearing on July 27, 2003, and over three years later, on October 18, 2006, DHCR issued the Decision being challenged here which confirmed the revocation of the MCI.

DISCUSSION

This dispute relates to work done by the Owner between seven and eight years ago and a continuous dispute in which DHCR admittedly failed to accord, at different times, both tenant and the Owner due process resulting in several vacations of DHCR's own rulings, and re-hearings by DHCR finally culminating in denial of an MCI based on defects in workmanship of the work.

DHCR has often been involved in disputes with Owners over MCI improvements relating to the quality of the work done. DHCR takes the position that where there is a showing of a widespread pattern of defects, DHCR may decline to allow the MCI for all apartments, but where there are a smaller member of defects, the DHCR may grant the MCI withholding its applicability to the apartments where defects exist, until the defects are cured.

The theory of denying the MCI in its entirety is based on the concept that a building-wide failure to do a workmanlike job goes to the Bona fides of the Owners actions.

Although entitlement of an Owner for an MCI increase is simply set forth in Code 2322.4 to require that the work be an improvement to the building, DHCR has consistently taken the position that at some level, the work done must pass a basic test that it be done in a workmanlike manner. The courts have regularly upheld this concept, albeit quibbling over what lever of performance is to be required. While some tenants facing rent increases often argue for perfection, others merely seek a decent job consistent with their tenancy rights. Some Owners faced with the realities of construction inside occupied apartments in old buildings correctly argue that tenants must settle for less than perfection, while other Owners attempt to palm off third rate work and cut corners in doing so.

In the middle is DHCR which must balance and resolve these competing claims and must decide which are legitimate and which are illegitimate. While the courts may review such decisions of DHCR, they may only do so under the strictures of CPLR Art. 78, which limits such review to whether the decision had a rational basis or was arbitrary or capricious.

Here, it took DHCR seven years to make its determination of a basic factual dispute - was the work generally performed in workmanlike manner, considering the age of the building and tenant interference or was the Owner trying in bad faith to pass off an wholly inadequate job and later attempting to slide by when caught.

While the process shows procedural errors and delays by which DHCR has delayed the resolution of this matter, DHCR eventually corrected its procedural errors and made its decision. It is that decision, and not DHCR's stuttering progress towards the Decision which this Court must address.

Here, DHCR found as a matter of fact that the work was initially done in a shoddy manner, leaving holes, bad refinishing and long delays in completion of work in apartments and that the Owner only reluctantly and incompletely responded, overstating the cure of such problems, until after the DHCR had issued the 2002 Decision, five years after the Owner claimed to have finished the work. In reviewing the record, this conclusion is within those conclusions that could have been drawn by DHCR from the record before it. Accordingly, such decision was not arbitrary and capricious. Whether or not this Court might have reached the same conclusion is not relevant in CPLR Article 78 proceeding. Accordingly, this Court may not vacate the Decision.

An Owner has a responsibility to do work in an occupied apartment building in a reasonable fashion. The MCI system in reimbursing an Owner for work performed allows the Owner to spend what is necessary² to complete a job in an

² The MCI system reimburses the Owner for amounts actually spent to do the work without limitation. Accordingly, any decision to spend less or take a lower bid and perhaps a less competent contractor is the owner's decision and it cannot be blamed on the regulatory system.

acceptable manner. The finding by DHCR that the owner did not do so is supportable by the record.

The Owner attacks the Decision on many grounds. While the Owner claims that many of the tenant complaints related to apartment defects not related to the MCI, such complaints may be expected from tenants who may not have the technical expertise to separate out their general problems from those relating to the MCI. However, the record and the DHCR inspections support DHCR's conclusion that the MCI work itself was generally done in a slipshod fashion, even though not all of the tenant assertions were sustained. Further, there is no showing that DHCR considered those tenant complaints which were unrelated to the MCI work in issuing its Decision. The Owner had a responsibility to monitor its own work; clearly it failed to do so when the work was initially performed.

The Owners' reliance on tenant sign offs are also not sufficient. Some sign offs were first submitted with the Article 78 petition and could not therefore be the basis of DHCR error as such sign offs were not before DHCR. Further, the sign offs do not relate to the workmanlike quality of the initial installation, which is the issue here, only to whether work was performed, and do not even show when the work was performed. Many tenants from whom sign-offs were obtained made it clear and continued to complain of the quality of the work.

* 9]
The Owners object to the sample of six apartment in the inspection. Yet such six in a 24 unit building are a reasonable sample where the question is over workmanlike performance, as distinct from a question of a defective installation, where a percentage analysis of the number of faulty installation (such as window air conditioners, fixtures or appliances is a more important consideration.

The Owners' objection that the delay in inspection by DHCR was a problem is not a valid objection. Evidence of holes, bulges, lack of finishing was not affected by time, unlike the situation where a multi-year delay between installation and inspection might be problematic to determine whether an appliance or window, in continuous use worked or functioned well initially.

While counsel for the Owner argues that it is unfair to deprive an Owner who has made an investment in a building a return on such investment, the investment must result in a completed improvement. Clearly the action taken by the Owner here after 2004 to address many of the defects of the initial work by repairing replastering, re-filling and filling of holes, to show that the work was substantially unfinished when the owner applied for the MCI in 1999, five years earlier.

While such recent actions to cure the conditions of 1999 are commendable, such actions do not answer the rationale of DHCR's approach to deny an MCI for work initially completed in a generally unworkmanlike manner. If anything, this late

spate of corrective measures reinforces DHCR's conclusion that the initial work was indeed unacceptable.

DHCR's determination to impose the severe sanction of disallowance on performing work in a generally unworkmanlike manner is itself not arbitrary and capricious. The Owner, not a tenant nor the DHCR is in the best position to see that work in a building is performed properly. The Owner, not a tenant or DHCR, has the ability to monitor the contractor and the power to enforce compliance with proper standards by monitoring progress payments and retainages. Because the Owner has the power and is in the position to do so, to the extent an Owner does not oversee such construction and monitor its completion through the resolution of punch list items, he may not complain later of loss due to his failure to oversee the work. Here, finding by DHCR that the work was performed in a shoddy manner was well supported.

DHCR's position recognizes that where there is construction there are invariably problems which should be resolved, even where the construction generally followed workmanlike standards. The DHCR penalty of total denial is limited to cases where the failure is systematic. In making such a determination, the DHCR must balance the purpose of the MCI against the need to create substantial incentives to Owners to monitor their construction projects. This Court cannot find that DHCR

has not made the proper balance here.

In considering the Owner's and the Tenants' submissions, DHCR had to make certain factual determinations as to who was telling the truth where their testimony conflicted. Using its inspection as a basis, DHCR discounted certain statements of the Owner. The record also shows earlier Owner attempts to pass off certain work which was not performed³ and the failure to submit the J-51 certificate when granted. Such factors could also be used by DHCR in evaluating the reliability and veracity of the Owners in resolving factual disputes. This Court may not second guess DHCR's resolution of the conflicting factual submissions.

The petition is dismissed.

This is the Decision and Order and the Court.

DATED: JULY 27, 2007
NEW YORK, NEW YORK

FILED
AUG 08 2007
NEW YORK
COUNTY CLERK'S OFFICE



Hon. Lewis Bart Stone
Justice of the Supreme Court

³ The originally submitted application claimed new toilets were installed. Apparently they were not. Toilets represented over 27% of the total MCI application. 25%. While small variations and errors are apparently not uncommon in MCI submissions, this significant overstatement for obviously non-existent work is a relevant fact from which adverse conclusions as to the veracity of an owner's factual statement may be drawn by DHCR in resolving disputed facts.